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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 588.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellants,

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

FOREWORD.

Appellants' Statement as to Jurisdiction sets forth the basis of this Court's jurisdiction over this appeal, the statement of the case, and a statement of the question presented, and contains references to the opinion of the District Court, the report of the Interstate Commerce Commission, and the applicable statutory provisions.

Motions to affirm the judgment of the District Court have been filed by the plaintiff below, Mississippi Public Service Commission, hereinafter called the Mississippi Commission, and by certain of the intervening plaintiffs, hereinafter called the shipper appellees. The Interstate

Commerce Commission is sometimes referred to hereinafter as the Commission.

It is appellants' position that the question raised by this appeal is substantial and of general public importance and merits full consideration by this Court and that the judgment of the District Court should be reversed.

SUMMARY OF ARGUMENT.

In this proceeding the Commission prescribed intrastate freight rates for the movement of certain important commodities within the State of Mississippi after finding that the intrastate rates required by the State authorities to be maintained on those commodities caused and would cause unjust discrimination against interstate commerce.

The District Court found no fault with the adequacy of the findings made by the Commission, which were substantially similar to those approved by this Court in *King* v. *United States* (1952), 344 U. S. 254. However, with one judge dissenting, the District Court set aside the order on the ground that it was not supported by substantial evidence.

The errors of the District Court which led it to misapprehend and misapply the proper standards for determining whether the order was supported by substantial evidence fall into two general categories: First, the District Court not only displaced the Commission's choice between two fairly conflicting views of the evidence but it also invaded the specialized field of knowledge of the Commission and substituted its judgment for that of the Commission on matters properly within the province of the Commission; second, the District Court committed certain errors of law as to what evidence was necessary to support the order under review and, in part, based its conclusion that the order was not supported by substantial evidence upon the lack of certain evidence which this Court has held is not necessary to support such an order.

In *Florida* v. *United States* (1934), 292 U. S. 1, 12, this Court ruled that the question of the weight of the evidence

was for the Commission and not for the courts. Had that rule been applied here, the order of the Commission would certainly have been upheld. An order of the Commission prescribing intrastate rates in Louisiana upon substantially similar evidence was upheld recently in *Louisiana Public Service Commission* v. *United States* (1954), 125 F. Supp. 180, affirmed by this Court in *Louisiana* v. *United States* (1954), 348 U. S. 885.

The opinion of the District Court evidences its belief that the decision of this Court in *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474, conferred on it much greater latitude for weighing the evidence than this Court has previously permitted to courts reviewing orders of the Interstate Commerce Commission. It is appellants' position, however, that no such effect can be ascribed to *Universal Camera* and that that decision did not change the established rule of *Florida* v. *United States* (1934), 292 U. S. 1, 12, *supra,* that the question of the weight of the evidence is for the Commission and not for the courts.

In *Universal Camera,* this Court said that a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment wholly at large. This Court made it clear that a reviewing court cannot invade the function of the administrative agency within its specialized field of knowledge nor can it displace the agency's choice between two fairly conflicting views of the evidence even as to matters not within such a specialized field of knowledge.

We are not asking this Court to review the evidence to determine if the District Court was right or wrong. We are asking this Court, however, to rule that the District Court in fact displaced the Commission's choice between two fairly conflicting views of the evidence when it re-

ferred to the "testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests" as to the revenue effect of the increased rates and found such evidence not to be substantial. Likewise, we are asking this Court to hold that the District Court invaded the field of special competence of the Commission when it said it must weigh the effect of competition upon the fixing of reasonable rates. And when the District Court held that the Commission disregarded evidence of lower passenger deficits in Mississippi, in spite of the fact that the Commission had discussed this evidence and stated that it did not establish the claim of the Mississippi Commission, we submit that the District Court improperly invaded the province of the Commission both as to the weight of the evidence and matters within the specialized field of knowledge of the Commission.

We also ask this Court to rule that the District Court grossly misapplied the substantial evidence standard when two errors of law entered into its determination that the order was not supported by substantial evidence. This Court has held that the carriers are not required to attempt to separate property investment and expenses as between interstate and intrastate traffic. Yet the District Court assigned the lack of such separation as the principal reason for its conclusion that there was no substantial evidence to the effect that the Mississippi rates were abnormally low and that traffic thereunder failed to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The District Court also held that, for the exercise of the Commission's power under § 13(4) of the Act, it must be shown among other things that injury to interstate shippers has resulted, although it is well established by decisions of this Court that such injury is not one of the

elements essential to support an order based on a discrimination against interstate commerce.

These matters all concern the question whether the District Court applied the proper standards for determining whether the order of the Commission is supported by substantial evidence. Unless the District Court is to be the final and sole judge of its own power to determine the substantiality of evidence, the important questions raised by this appeal should have the considered judgment of this Court. While there may be a twilight zone between what is permissible in the way of judicial review and what is not, appellants submit that the District Court has so far exceeded the proper scope of judicial review in these several aspects that there can be no doubt that it has in fact misapprehended and grossly misapplied the standard of *Universal Camera* for determining the substantiality of evidence.

ARGUMENT.

I.

THE QUESTION PRESENTED BY THIS APPEAL IS OF GENERAL PUBLIC IMPORTANCE.

The question presented by this appeal and the subsidiary questions comprehended therein are important not only to the parties to this proceeding but also to the Interstate Commerce Commission in its administration of the Interstate Commerce Act, to the railroads generally, and to the shippers in all parts of the United States.

During the post-war period of increasing railway operating costs, the Interstate Commerce Commission has found it necessary to authorize several general increases in the interstate freight rates and charges of the railroads of the United States, the latest one being *Increased Freight Rates, 1951*, 284 I. C. C. 589, out of which this proceeding grew. Various state commissions, however, have refused to permit intrastate freight rates to be increased so as to bear their fair share of the increased operating costs of the carriers. This has resulted in numerous proceedings under §13(4) of the Interstate Commerce Act, 49 U. S. C. §13(4). In several of these proceedings, the Commission has found that the intrastate rates which the state authorities have required the carriers to maintain resulted in unjust discrimination against interstate commerce and has ordered such discrimination to be removed, as it did in this case.

Several such cases have been decided within the last three years and many others are pending at the present time. The orders entered by the Commission in two such

cases have recently been upheld in the courts. *Louisiana Public Service Commission* v. *United States,* 125 F. Supp. 180, affirmed in *Louisiana* v. *United States,* 348 U. S. 885; and *State of North Carolina* v. *United States,* ..... F. Supp. ....., (E. D. N. C.) decided February 11, 1955. In the latter case, notice of appeal to this Court has been filed.

It would seem evident that all orders entered by the Commission prescribing intrastate rates by virtue of the authority conferred on it by §13(4) of the Act to remove discrimination against interstate commerce should be adjudged on judicial review by substantially the same standards no matter in what court they are reviewed. The application by the District Court of an erroneous standard of judicial review is not only unfair to appellants here, but it is also unjust to interstate shippers and to intrastate shippers in other states who have to pay increased freight rates under substantially similar conditions.

Furthermore, if this Court approves the action of the District Court, it would be an invitation to all the reviewing courts to substitute their judgment for that of the Commission on the weight of the evidence, and the lack of uniform standards for determining the substantiality of evidence would make the Commission's administration of § 13(4) of the Act extremely difficult if indeed its power to prescribe intrastate rates would not be nullified completely.

II.

THE QUESTION PRESENTED BY THIS APPEAL IS SUBSTANTIAL.

A. Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, Has Not Changed the Rule of Florida v. United States, 292 U. S. 1, That the Weight of the Evidence Is for the Commission and Not for the Courts.

In *Florida* v. *United States* (1934), 292 U. S. 1, 12, this Court stated as follows the rule which was to govern courts called upon to review judicially orders of the Commission entered under §13(4) of the Act:

> "The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by §13(4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *Shreveport Case*, 234 U. S. 342, 351, 354, 355; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co., supra.* The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation

> to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission."

Had the District Court followed this rule as it has been followed by other courts through the years, the Commission's order would unquestionably have been sustained. However, the District Court's opinion makes it quite clear that that Court interpreted *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474, as giving it considerably more latitude in the matter of weighing the evidence and drawing inferences and conclusions from the evidence. How this latitude was exercised will be shown later.

It is clear, however, from the decision of this Court in *Universal Camera* that no such drastic enlargement of the reviewing courts' power was intended by that decision holding that the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. Thus, this Court said:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it

de novo. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." 340 U. S. at 488.

How far a reviewing court may go in determining the substantiality of the evidence cannot be delimited with exactitude. As this Court recognized, no formula can be devised to avoid the process of judgment. But the Court also made it equally clear that a reviewing court's judgment is not left entirely at large, saying:

> "Whatever changes were made by the Administrative Procedure and Taft-Hartley Acts are clearly within this area where precise definition is impossible. Retention of the familiar 'substantial evidence' terminology indicates that no drastic reversal of attitude was intended.
>
> "But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in." 340 U. S. at 489.

It must also be borne in mind that the specific issue causing a reversal in *Universal Camera* concerned the effect to be given an examiner's report. This Court held that, apart from that issue, it could not be said that the Board's order was not sustained by substantial evidence considering the "record as a whole." 340 U. S. at 491-2.

Whether the District Court did exceed the proper scope of judicial review in the matters which will be discussed in the remaining sections of this brief certainly raises substantial legal questions on which this Court ought to pass, involving as they do a section of the Interstate Commerce Act under which there is a considerable amount of litigation.

The resolution of these questions does not require this Court to examine the record. The shipper appellees refer to the record in this proceeding as "voluminous" and "long and complex" (Motion to Affirm, pp. 3, 15) and the District Court said it had not overlooked the "testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests." 124 F. Supp. at 816; S. J. 25.* But whether the District Court is permitted to draw conclusions exactly opposite from those drawn by the Commission simply because there is a conflict in the evidence raises a legal question which needs no examination of the record for an answer.

Likewise, whether this Court will permit to go uncorrected errors of law which obviously contributed to the District Court's conclusion that the order was not supported by substantial evidence raises a substantial question which requires no reference to the evidence by this Court.

And certainly when the District Court holds (124 F. Supp. at 815; S. J. 25):

> "There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient."

which is directly contrary to the decision of this Court in *King* v. *United States* (1952), 344 U. S. 254, *supra*, that raises a question of law which does not require any extended reference to the record.

Indeed, there is nothing to indicate that the District Court itself gave the record more than a cursory inspection at the most. The transcript of the testimony before the Commission was 886 pages in length, and 126 exhibits

* S. J. indicates a reference to appellants' Statement as to Jurisdiction where the opinion of the District Court appears.

were introduced in evidence. It is appellants' contention that, when a reviewing court sets aside an order based on such a record on the ground that it is not supported by substantial evidence, the court has an obligation to discuss the evidence. That is especially true here where one judge dissented stating that, in his opinion, the order was supported by substantial evidence. A statement that it would "unduly prolong this opinion to undertake to point out in detail the testimony of the various witnesses and the things that detract from the substantiality of the evidence" (124 F. Supp. at 816; S. J. 27) is not a substitute for an adequate discussion of what the evidence did show. Mere generalities do not show that a reviewing court has in fact conscientiously examined the record.

The shipper appellees suggest that the fact that this case was under advisement for four and one-half months and that "the Judge who wrote the opinion for the majority was the Judge who denied appellees' request for a temporary restraining order at the outset of the case" shows "a change of attitude which could result only from a study of the whole record." Motion to Affirm, p. 7. Aside from the obvious fallacy in this argument, appellees might also have mentioned that the same Judge at the close of the hearing on the merits announced that appellees' request for an interlocutory injunction had been denied and that less than twenty-four hours later the parties were informed that the Court had decided to grant an interlocutory injunction. If any inferences are to be drawn from these facts, it appears more likely that the case was decided without any inspection of the record.

B. The District Court Erred in Substituting Its Judgment for That of the Commission as to the Revenue Effect of the Increased Rates and the Effect of Competition on the Reasonableness of the Rates.

The District Court made several references to the effect that it must "weigh" the evidence. As pointed out in appellants' Statement as to Jurisdiction, this cannot be ascribed merely to an unfortunate choice of language but rather it clearly indicates the application of an erroneous standard of judicial review and one which is in no way sanctioned by *Universal Camera*. There can be no doubt that the District Court did "weigh" the testimony in violation of the rule of *Florida* v. *United States* (1934), 292 U. S. 1, *supra*. If that rule still governs the review of orders of the Commission under § 13(4) of the Act, the judgment of the District Court must necessarily be reversed.

On two issues particularly did the District Court depart far from its permitted scope of judicial review. One of these involved the effect of competition on the fixing of reasonable rates. On this point, the District Court said:

> "In fixing reasonable rates competition is one of the elements to be considered and is frequently controlling. See *Interstate Commerce Commission* v. *Chicago Great Western Railway Co.*, C. C., 141 F. 1003. In determining the legal question as to whether the evidence amounts to substantiality and in adjudicating whether there was substantial evidence or not, the court likewise must weigh such factors." 124 F. Supp. at 816; S. J. 26.

Clearly, the District Court was in error in undertaking to weigh the effect of competition on the reasonableness of the rates. Such a matter is clearly outside the permitted scope of judicial review. If there is anything within the

special competence of the Commission in a rate case, the effect of competition on the reasonableness of rates certainly must be. Having concluded, however, apparently on the supposed authority of *Universal Camera*, that it could disregard the evidence of the carriers and "weigh" the effect of competition on the reasonableness of the rates, the District Court then proceeded to find that the Mississippi Commission was in a better position to determine the effect of competition than was the Interstate Commerce Commission, a matter about which something more will be said later.

Another point on which the District Court departed far from the proper standard of review concerned the revenue effect of the increased rates ordered by the Commission. In addition to statistical evidence showing that in the past rate increases had resulted in increased revenue to the carriers, experienced traffic officials also testified that, based upon their knowledge of the situation, it was their opinion that substantial increased revenue would result from the rate increases. The District Court concluded, however, that this evidence was not substantial "when weighed in the light of the prevailing rule of law." 124 F. Supp. at 816; S. J. 26. The District Court then continued:

> "The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testimony has been fully weighed in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission." 124 F. Supp. at 816; S. J. 26-7.

Admittedly, some of the shippers testified that in their opinion the increased rates would not result in increased revenue for the carriers. This conflict in the evidence, however, was for the Commission to resolve, not for the District Court, and *Universal Camera* clearly so states. 340 U. S. at 488.

This Court has recognized that findings as to the future revenue effect of increased rates must necessarily rest upon predictions and has specifically approved findings based upon the type of evidence presented by appellants in this case. Thus, in *United States* v. *Louisiana* (1933), 290 U. S. 70, 80, this Court said:

> "It is manifest that any finding of undue prejudice to interstate commerce, based upon the failure of prevailing intrastate rates to contribute their fair share to the support of a national transportation system, must necessarily rest upon a prediction that an increase of the intrastate rates will result in an increase of revenue, a prediction involving especially since 1930, many elements of uncertainty. There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute."

Also, in *Florida* v. *United States* (1934), 292 U. S. 1, 9, *supra,* this Court said:

> "The requirement of essential findings as to revenues did not demand an impracticable exactness. Losses through inadequate rates could be shown satis-

factorily even though proof of the precise extent of such losses was not available. Reasonable determinations were required and these were made."

The evidence of appellants as to revenue losses from the present rates and the revenue effect of the increased rates clearly met the essential requirements of the law as interpreted by this Court. For the District Court to substitute its judgment for that of the Commission was a gross error which should be corrected by this Court.

The recent decision of a specially constituted three-judge District Court upholding an order of the Commission prescribing intrastate rates in Louisiana not only illustrates the correct rule of judicial review for determining the substantiality of evidence but also shows the unfairness which results when in one state such an order of the Commission is upheld and in a neighboring state such an order is set aside simply because the two courts followed different rules for determining the substantiality of the evidence.

In *Louisiana Public Service Commission* v. *United States* (1954), 125 F. Supp. 180, 183, *supra,* the Louisiana District Court said:

> "We have considered the entire record, which comprises nearly one thousand pages of testimony and a great number of exhibits. In the belief that no useful purpose would be served by our reviewing the record here we shall not do so. It is sufficient to say that the Commission had before it a large volume of substantial evidence adduced by both sides of the controversy. In reaching its conclusions it was necessary for the Commission to weigh the evidence. That was a function which peculiarly addressed itself to the expertise of the Commission."

This decision was affirmed *per curiam* by this Court in *Louisiana* v. *United States* (1954), 348 U. S. 885, *supra.*

The record before the Commission in the present proceeding contained 886 pages of testimony and 126 exhibits. While no two cases are exactly alike, appellants do earnestly submit that this case and the *Louisiana* case involved substantially similar issues and that a fair reading of the reports of the Commission in the two cases, appearing at 291 I. C. C. 39 and 291 I. C. C. 279, will show that both orders were supported by substantially similar evidence. The same may be said for the decision of the Commission in *North Carolina Intrastate Freight Rates and Charges*, 293 I. C. C. 541, recently upheld in *State of North Carolina* v. *United States*, ... F. Supp. ..... (E. D. N. C.), *supra*, decided February 11, 1955. in which notice of appeal to this Court has been filed.

The shipper appellees' argument that the sand and gravel situation in Mississippi is different from that in Louisiana is no more reason for denying the Interstate Commerce Commission jurisdiction over Mississippi intrastate rates than the fact that there is a substantial movement of sugar cane in Louisiana and not in Mississippi would have been for denying the Commission jurisdiction over intrastate rates in Louisiana. Appellants submit that a fair analysis of the two cases will show that the difference in result was due not to any difference in conditions but to different standards of judicial review being applied in the two cases.

C. It Is Evident That the District Court's Errors of Law With Respect to Separation of Interstate and Intrastate Expenses and Property Investment and Lack of Injury to Interstate Shippers Were Important Factors in Its Conclusion That the Commission's Order Was Not Supported by Substantial Evidence.

Appellees argue that the errors of law made by the District Court should be ignored because such errors were not "holdings," that such errors were "peripheral rather than basic," and that such errors were not advanced by the District Court as reasons for its ultimate holding. Mississippi Commission's Motion to Affirm, pp. 11-13; shipper appellees' Motion to Affirm, pp. 12-14.

In dealing with the separation of interstate and intrastate expenses and property investment, the District Court said:

> "There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers." 124 F. Supp. at 815; S. J. 24.

Clearly, this shows that the District Court's conclusion that the order was not based on substantial evidence was founded to a considerable extent on the District Court's belief that there should have been such a separation.

The District Court's finding that appellants did not separate revenues as between interstate and intrastate traffic is in error. Appellants did make such a separation of revenues (Ex. 1, sheet 3). But for obvious reasons, the separation of expenses and property investment between interstate and intrastate traffic where such traffic is handled in the same trains, through the same stations and by the same personnel is quite a different matter from the separations of revenues between interstate and intrastate traffic. The Commission, the expert body having knowledge of such matters, has held that separation of investment in properties and expenses of handling traffic as between interstate traffic on the one hand and intrastate traffic on the other hand is impracticable and is not required. *Wyoming Intrastate Freight Rates and Charges* (1953), 287 I. C. C. 743, 755; *North Carolina Intrastate Freight Rates and Charges* (1954), 293 I. C. C. 541, 557, *supra*. Its order in the latter case was, as previously stated, upheld in *State of North Carolina* v. *United States*, ... F. Supp. ....., (E. D. N. C.), *supra*, decided February 11, 1955, where again this issue was dealt with, and it was ruled that the position of the Commission was sound.

This Court has specifically held that no such separation is required. In *Illinois Commerce Commission* v. *United States* (1934), 292 U. S. 474, 483-4, this Court said:

> "Specific objections to the sufficiency of the findings * * * are that * * * there was no finding which separated interstate and intrastate property, revenues and expenses of the carriers so as to make it possible to compare revenues with cost for the two classes of traffic considered separately. * * * Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately

> bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues."

The correct rule as stated by this Court on numerous occasions is that the power of the Commission to require an increase in intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return "on the value of property devoted to the transportation service, both interstate and intrastate." *United States* v. *Louisiana* (1933), 290 U. S. 70, 75 *supra; North Carolina* v. *United States* (1945), 325 U. S. 507, 520.

In spite of the decisions of this Court and lower courts to the contrary, the Mississippi Commission argued in the District Court that, since no separation of property and expenses had been made, there was nothing to show that the carriers were not making a reasonable return from their intrastate rates. At page 10 of its brief in the District Court, the Mississippi Commission said:

> "In the first place, we point out that in the proceedings before the Commission, the railroads involved made no separation of their revenues, expenses and properties as between interstate and intrastate operations. There is nothing in the record, therefore, by which it can be determined whether the railroads' intrastate operations were already affording a fair and reasonable return. The record is entirely silent, so far as the railroads' evidence is concerned, upon the important question of whether or not the carriers' operations under the superseded rates were already affording and yielding adequate revenue."

Masonite Corporation and The Flintkote Company also took the same position in their brief. It is strange that these parties should now say that the District Court did not rely on this argument which they so strongly urged

upon it. Clearly, the contrary is true. The District Court did adopt this argument and gave it as one of the prominent reasons for its conclusion that the Commission's order was not supported by substantial evidence.

Another error of law was made by the District Court in stating the essential requirements for the validity of an order under §13(4) of the Act. The District Court said:

> "In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13(4) of the Act, it must be shown, among other things * * * (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; * * *" 124 F. Supp. at 813; S. J. 20.

Appellees' argument that this is not a "holding" is so lacking in merit as to require no refutation.

The distinction between orders based upon unjust discrimination against interstate commerce and those based upon undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other not only clearly appears in §13(4) of the Act itself but was spelled out by this Court in *Florida* v. *United States* (1931), 282 U. S. 194, 214, and was called to the attention of the District Court in the brief of appellants. If the District Court had understood this distinction, it surely would not have held that injury to interstate shippers was a necessary requirement for orders based on discrimination against interstate commerce.

This holding of the District Court, listing what it conceived to be the essential requirements for upholding the validity of any order entered under § 13(4) of the Act, appears to have been adopted word for word from page 4 of the Mississippi Commission's brief before the District Court. It can hardly have been an inadvertence, as argued

by the shipper appellees (Motion to Affirm, p. 14), and there is every reason to believe that the District Court's conclusion that the order was not supported by substantial evidence was based in part on its erroneous concept of what was necessary to support the validity of such an order.

What may be regarded as the ultimate finding of the District Court was:

> "The order in this case when viewed in the light of the entire record and all of the circumstances leading up to its passage and giving weight to all things that detract from the sufficiency of the evidence is not supported by substantial evidence and must be set aside and its enforcement enjoined." 124 F. Supp. at 815; S. J. 23.

In the light of this finding, it is impossible to conclude that the District Court did not put any reliance on these errors of law in concluding that the order was not supported by substantial evidence. The District Court's opinion shows that the contrary is true. Even if the District Court had made no other errors, these alone would warrant reversal of its judgment.

D. The District Court Erred in Holding That Findings of the Mississippi Commission Made in Another Proceeding Involving Dissimilar Issues Upon Evidence Not a Part of This Record Detracted from the Findings of the Interstate Commerce Commission.

The District Court seemed to think that one of the principal questions in this case was whether the Interstate Commerce Commission or the Mississippi Commission is best able to regulate intrastate rates in Mississippi, a matter which is wholly foreign to the issue of whether the intrastate rates cause discrimination against interstate commerce.

The District Court referred to the study and investigation given the matter by the Mississippi Commission and the fact that the Mississippi Commission had heard the evidence itself and not through an examiner while the Interstate Commerce Commission had heard the evidence through an examiner. It also concluded that the Mississippi Commission was in a better position than the Interstate Commerce Commission to determine the effect of competition upon the carriers. 124 F. Supp. at 814, 816; S. J. 22, 26.

True, it paid lip service to the correct rule of judicial review, that findings of the Interstate Commerce Commission must be upheld if supported by substantial evidence, but its opinion shows that, in concluding that the order was not supported by substantial evidence, it gave weight to matters which are entitled to no weight in this proceeding. Thus, the District Court said:

> "Different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates. The findings of a state commission which is familiar with such conditions in the state, with the location of competing highways and other forms of carriers, when its opinion differs from the Interstate Commerce Commission's findings detracts heavily against the findings of the Interstate Commerce Commission, whose testimony is taken before an examiner." 124 F. Supp. 815-16; S. J. 25.

This, in effect, erroneously requires the Interstate Commerce Commission to overcome a presumption against the validity of its order.

The argument of the Mississippi Commission that its findings may be considered in the same light as those of a trial examiner (Motion to Affirm, p. 10) is, we believe, sufficiently lacking in merit as to require no discussion. The substantiality of the evidence to support the Commis-

sion's order must be determined on the evidence before the Commission. The fact that the orders of the Mississippi Commission were attached as exhibits to the petitions of the carriers seeking relief from the Interstate Commerce Commission does not entitle such orders to evidentiary weight as to the reasonableness of the rates or similar matters. For the District Court to give them such weight was erroneous as was also the weight it apparently gave to its belief that the Mississippi Commission was better able to regulate intrastate rates than the Interstate Commerce Commission. For these errors, too, its judgment must be reversed.

E. The District Court Erred in Holding That the Commission Disregarded Evidence of Lower Passenger Deficits in Mississippi.

It is impossible to tell from its opinion just what the District Court did hold or intend to hold with respect to the passenger deficit question. This is what the Court said:

> "The Interstate Commerce Commission in *Ex Parte* No. 175, when granting freight rate increases took into consideration the losses sustained by the railroads in passenger operations. This was correct and was upheld in *King* v. *United States,* 344 U. S. 254, 73 S. Ct. 259, 97 L. Ed. 301, but in determining the intrastate rate in Mississippi the Commission refused to take into consideration the lower passenger deficits which prevailed in Mississippi.
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> "The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole. The Mississippi Commission offered evidence showing that passenger deficits in Mississippi were substantially less than passenger deficits of the same railroads for their

> systemwide operation and according to the statistics introduced there was a vast difference. Passenger deficit is an element to be taken into consideration in rate making by the Interstate Commerce Commission, and as a matter of law, it is the duty of that Commission to consider it in determining whether rates should be increased or decreased, and if the passenger deficit in Mississippi was less than that of the nation as a whole, it was the duty of the Commission to give proper consideration to this testimony. *King* v. *United States, supra.*" 124 F. Supp. at 815, 817; S. J. 24-5, 28.

In one breath the District Court speaks of lower passenger deficits in Mississippi as an established fact and in the next says that "if the passenger deficit in Mississippi was less than that of the nation as a whole," it was the duty of the Commission to give consideration to that fact. Obviously, these are quite different things.

Certainly, the District Court did not intend to hold as a matter of law that the Commission must determine passenger deficits by States. That is not required under *King* v. *United States* (1952), 344 U. S. 254, *supra,* and it would be unthinkable that such a rule could be imposed on the Commission by a District Court and without full consideration by this Court of the results of such a holding. The District Court obviously gave no such consideration to the problem. There are many ramifications to the question. For one thing, if expenses and property investment cannot practicably be separated as between those applicable to interstate traffic and those applicable to intrastate traffic, why is there any reason to require an arbitrary separation of passenger operations by States which would be no more reliable?

Although the Interstate Commerce Commission has a formula for separating the results of freight and passenger operations, there is no such formula for separating freight and passenger operations within a State. On other occa-

sions, the Commission has noted the general unreliability of operating results subdivided as to States. In *Western Trunk Line Class Rates* (1930), 164 I. C. C. 1, 62-63, the Commission considered in detail the problems incident to the separation of operating results by States and concluded:

> "Without reviewing here all the defects and infirmities claimed in the formulas for allocating revenues, expenses, and other items to States, the foregoing will suffice to cast doubt upon the reliability of operating results subdivided as to States."

See also *Minnesota Intrastate Rates and Charges* (1953), 288 I. C. C. 149, 157, where a similar contention was discussed in a proceeding arising under §13(4) of the Act.

Furthermore, it is apparent that there was no reliable factual basis for the claim of the Mississippi Commission that passenger deficits were lower in Mississippi than in other parts of the Nation. Aside from the general unreliablity of an attempted segregation of operating results by States, there are a few other brief comments which should be made concerning this evidence of the Mississippi Commission. The Mississippi Commission says that its evidence on this point "was not contradicted" (Motion to Affirm, p. 14), which is certainly not the case.

In the first place, when the Mississippi Commission speaks about passenger deficits in Mississippi, it is not referring to Mississippi intrastate passenger operations; rather, it is referring to its attempt to develop results for Mississippi passenger operations including both intrastate and interstate operations within the State of Mississippi (Tr. 433). No attempt was ever made to develop results for Mississippi intrastate passenger operations. Under such circumstances, how could there be any possible legal basis for treating the intrastate shipper of freight any

different from the shipper who ships to, from or through Mississippi in interstate commerce?

Furthermore, as shown by the cross-examination of the witness for the Mississippi Commission (Tr. 830, 836-9) and by appellants' rebuttal testimony (Tr. 869-72), the testimony and exhibits of the Mississippi Commission were so full of errors as to be completely unreliable. The Commission was justified in not accepting such evidence as showing lower passenger deficits in Mississippi.

What did the District Court mean by saying the Commission must consider this evidence? Obviously, the Commission did consider it. In its report, 291 I. C. C. at 63, it said:

> "The Mississippi commission presented data designed to show that the discontinuance of several passenger trains in Mississippi and the furnishing of relatively less day-train service in that State than on other portions of the respondents' lines have resulted in proportionately smaller deficits in passenger revenue in that State. It argues that those changes have effected relatively greater economies in the respondents' intrastate operations than on other portions of their lines, requiring proportionately smaller contributions by the intrastate freight revenue to cover passenger-revenue deficits in Mississippi, which should be reflected in the level of the intrastate freight rates in relation to the interstate rates.
>
> "The respondents' passenger-service operations have shown deficits in each of the years 1940 through 1951, except for 1943 through 1945. They have become progressively larger each year, aggregating $60,249,439 in 1951. The passenger-train eliminations in recent years have affected all portions of their system lines. There is no indication that the economies effected in Mississippi were relatively greater than on other portions of their lines. The novel theory of rate-making advanced by the Mississippi commission contemplates that the freight-rate structure would vary according to variations in the passenger revenue by

territories, areas, States, and possibly by individual lines of railroad. Some of the respondents operate no passenger service. There is no sound basis for the contention that rate variations are justified because of such variations in passenger revenues."

There is nothing in the District Court's opinion to indicate that it was aware of this discussion by the Commission, although it was called to its attention in appellants' brief.

Since the Commission did consider this evidence, it is not for the District Court to substitute its judgment for that of the Commission on the weight of the evidence. The Commission was entirely correct in holding that the evidence did not establish that passenger-train eliminations resulted in lower passenger deficits in Mississippi than elsewhere on appellants' systems, as claimed by the Mississippi Commission. The Commission's holding on this point is supported by substantial evidence and the District Court, in invading the province of the Commission and substituting its judgment for that of the Commission, again misapprehended and grossly misapplied the standard of *Universal Camera*.

CONCLUSION.

The findings made by the Interstate Commerce Commission are substantially the same as those approved by this Court in *King* v. *United States* (1952), 344 U. S. 254, *supra*, and *Louisiana* v. *United States* (1954), 348 U. S. 885, *supra*. Those findings are, we submit, supported by substantial evidence.

It is evident that the majority of the District Court misapprehended and grossly misapplied the standard for determining the substantiality of the evidence set forth by this Court in a long line of cases and particularly in

Florida v. *United States* (1934), 292 U. S. 1, *supra*, and *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474, *supra*.

Appellants submit that the question presented by this appeal is substantial and of general public importance and merits full consideration by this Court and that the judgment of the District Court should be reversed.

Respectfully submitted.

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